

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION)

On ITS Own Motion)

-vs-)

Central Illinois Light Company)

Requirement to initiate program of)
tree trimming and vegetation management)

Docket No. 00-0699

**APPLICATION FOR REHEARING
ON BEHALF OF
CENTRAL ILLINOIS LIGHT COMPANY**

Now comes Central Illinois Light Company ("CILCO" or "the Company") pursuant to Section 10-113 of the Public Utilities Act ("Act"), 220 ILCS 5/10-113 (1997), and respectfully requests the Illinois Commerce Commission (Commission) to grant rehearing in the above-entitled proceeding with respect to all the matters determined in the Commission's Order entered on November 1, 2000.

Background - -

On November 1, 2000, the Commission entered an Order in the above-entitled proceeding. The Order concludes that CILCO has failed to perform tree trimming "that is necessary to minimize interruptions of service and the possibility of injury to employees and the general public," and the "health and safety of CILCO's employees, customers, and the public demand an upgrade of CILCO's tree trimming program." CILCO disputes these conclusions as well as many of the other statements of alleged fact in the Order.

The Order made CILCO a party to the proceeding and directed CILCO to "improve its tree trimming program to minimize interruptions of service and the possibility of injury to employees and the general public." The Order further directed that CILCO's tree trimming program shall comply with Finding 7 in the Order.

Finding 7 sets forth instructions for tree trimming, including a mandate "to provide maximum practical vegetation-to-conductor clearance considering the rights of property owners, public and worker safety, electric service reliability, previous pruning history, tree health, tree aesthetics, and efficient work production." CILCO submits that this part of the Order is so broad and vague that it is impossible to make an objective determination of the requirements. Moreover, the requirement that CILCO consider the "rights" of property owners, previous pruning history, tree health and tree aesthetics is not only vague, it is beyond the Commission's authority.

The Order further states that CILCO shall achieve a four-year tree trimming cycle by December 31, 2002. To accomplish this mandate of the Order, CILCO will be required to expend millions of dollars during the next two years that would not be required under a less stringent schedule. Further, failure of CILCO to satisfy the requirements of the Order could expose CILCO to penalties as provided under the Act, and to lawsuits from members of the public, who may claim that CILCO failed to consider their rights, tree health and tree aesthetics.

The Commission's Order was entered without prior notice to CILCO and without a hearing, in violation of CILCO's rights of due process and in violation of numerous provisions of the Public Utilities Act (Act), as hereinafter set forth. Therefore, the Order not only violates due process requirements, it is beyond the Commission's authority. CILCO further shows to the

Commission that entry of the Order was not necessary, because CILCO had committed, and had communicated its commitment to Staff prior to entry of the Order, to establish a four-year tree trimming cycle by December 31, 2002. CILCO assures the Commission that CILCO will keep its commitment even if the Order is vacated or rescinded. Therefore, apart from the unsupported findings and the vagueness of parts of the Order, CILCO does not oppose the establishment of a four-year tree trimming cycle as mandated by the Order. CILCO's primary concern is that the Order was entered without notice or hearing, and makes findings and reaches conclusions without any opportunity for CILCO to cross-examine or respond. If CILCO fails to challenge the Order and protect its due process rights, the Order would stand as a precedent for entry of orders which impose new and costly obligations upon utilities without the right to notice or hearing. For that reason, and because the Order imposes burdens upon CILCO which are highly subjective in nature and could unreasonably expose CILCO to complaints, penalties and litigation, CILCO requests the Commission to grant rehearing and thereafter rescind its Order in accordance with Section 10-113 of the Act.

The Order violates CILCO's rights to due process and the requirements of the Act - -

The Order purports to be based upon a Staff report which reflects an investigation made by Staff in the field. Section 10-101 of the Act provides that the Commission shall have power to hold investigations, inquiries and hearings concerning any matter covered by the provisions of the Act, but requires that

in the conduct of any investigation, inquiry or hearing the provisions of the Illinois Administrative Procedure Act, including but not limited to Sections 10-25 and 10-35 of that Act, shall be applicable and the Commission's rules shall be consistent therewith. Complaint cases initiated pursuant to any Section of this Act, investigative proceedings and ratemaking cases shall be considered "contested cases" as defined in Section 1-30 of the Illinois Administrative Procedure Act, any contrary provision therein notwithstanding.

Section 10-25 of the Administrative Procedure Act states that in a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.

Section 10-108 of the Act states that a complaint may be made by the Commission, on its own motion, but upon the filing of a complaint the Commission shall cause a copy thereof to be served upon the corporation complained of, together with a notice specifying the time and place of the hearing on the complaint.

Section 10-111 of the Act states that in any hearing, proceeding, investigation or rulemaking conducted by the Commission, the presiding officer "shall, after the close of evidentiary hearings, prepare a recommended or tentative decision" This requirement was not met. To the contrary, it appears that an the Order was prepared prior to submission of the matter to the Commission, and submitted to the Commission with Staff's investigative report. The report was not supported by testimony, and is not evidence. Section 10-201 of the Act states that

where the Commission has entered an order or decision that is not supported by substantial evidence based on the entire record of evidence for and against such order or decision, any court reviewing that order or decision on appeal "shall reverse" the order or decision.

The above-entitled proceeding is essentially a complaint proceeding, where the Staff or the Commission is the complainant. In addition, the proceeding is clearly an investigation, inquiry or hearing. Under all such scenarios, notice to CILCO and a hearing are required under Section 10-101 of the Act and the Administrative Procedure Act, before entry of an order. Because there was no notice to CILCO and no hearing, the Order was issued without statutory authority and is null and void.

CILCO is aware that the Order purports to have been entered pursuant to the provisions of Section 8-505 of the Act. That Section states that the Commission shall have power, "after a hearing or without a hearing as provided in this Section" to require every public utility "to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, customers and the public" The Commission's Order cannot be sustained pursuant to this Section. First, Section 8-505 states that the Commission shall have power to enter an order "after a hearing or without a hearing as provided in this Section." However, there is nothing in the section that provides for an order without a hearing. Second, Section 8-505 is clearly directed toward the maintenance of a utility's plant, equipment or other property. Trees along a utility's right-of-way are not utility property. Accordingly, the Order does not come within Section 8-505. Finally, even if the provisions of Section 8-505 were deemed to authorize an order without a hearing, a hearing is required in

connection with any investigative proceeding. As noted above, this proceeding is an investigative proceeding. For all these reasons, the Order cannot be sustained under Section 8-505.

The decision in *People ex rel. Illinois Commerce Commission v. Operator Communications, Inc.*, 281 Ill.App.3d 297, 666 N.E.2d 830 (1996), appeal denied, 168 Ill.2d 575, 671 N.E.2d 742, is dispositive of the issues raised by this Application for Rehearing. In that case, based upon a report from the Commission Staff, which was based upon a field investigation, the Commission, without notice or hearing, adopted a resolution requesting the Attorney General to initiate an injunction proceeding to require a public utility to cease charging rates in excess of its tariffs. The injunction was denied. On appeal by the Commission, the Appellate Court held that because the Commission's resolution was based upon an investigation by Staff, it was a "contested case" and a hearing was required under Section 10-101 of the Act and section 10-25 of the Administrative Procedure Act. As stated by the Court, "Investigative proceedings are contested cases under Section 10-101 of the Public Utilities Act," and the "Administrative Procedure Act requires that all parties in a contested case be given notice and an opportunity for a hearing." 666 N.E.2d at 833. The Court further concluded (666 N.E.2d at 833-4):

The statutory requirement of notice and opportunity to be heard are also necessary under principles of procedural due process. "Due process of law is served where there is a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered. (Citations omitted.) Administrative proceedings must conform to the requirements of due process of law. (Citations omitted.) A decision in a contested case which does not comply with the provisions of the Administrative Procedure Act is void.

Moreover, Section 8-501, not section 8-505, is the Section that is applicable to the instant situation. Section 8-501 provides that, after hearing, the Commission may enter an order relating to the "rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it" Section 8-501 is much broader than Section 8-505, and includes the practices and service of a utility, as well as the methods of distribution and transmission, and is the Section under which the Commission should have operated in this proceeding.

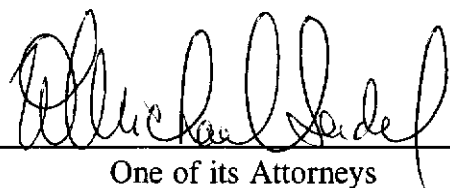
The directives in the Order also go beyond and are in conflict with the provisions of Section 8-505.1 of the Act, which specify the standards that must be followed by Illinois electric utilities in performing tree trimming.

Wherefore, for the reasons set forth above, Central Illinois Light Company respectfully requests that the Commission grant rehearing in this proceeding, vacate or rescind its order of November 1, 2000, in accordance with the provisions of Section 10-113 of the Act, and set this matter for hearing.

Respectfully submitted,

CENTRAL ILLINOIS LIGHT COMPANY

By:



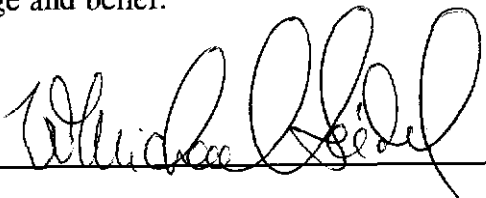
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STATE OF ILLINOIS)
)
COUNTY OF COOK) SS

VERIFICATION

W. Michael Seidel, being first duly sworn, upon oath deposes and states that he is one of the attorneys for CENTRAL ILLINOIS LIGHT COMPANY, that he has read the above and foregoing Application for Rehearing, that he is familiar with the facts stated therein, and the same are true to the best of his knowledge and belief.



W. Michael Seidel

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 22nd DAY OF
NOVEMBER, 2000.



Notary Public

